

**UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO**

PEDRO ROSSELLO, et al.,

Plaintiffs,

v.

BROWN & WILLIAMSON, et al.,

Defendants

CIVIL CASE NO. 97-1910 (JAF)

**DEFENDANT OPMS' FIFTH SUBMISSION OF SUPPLEMENTAL  
AUTHORITY IN SUPPORT OF MOTION TO ENFORCE THE ARBITRATION  
PROVISIONS OF THE MSA AND COMPEL ARBITRATION**

TO THE HONORABLE COURT:

COME NOW Philip Morris USA Inc., R.J. Reynolds Tobacco Company and Lorillard Tobacco Company (the "OPMs"), through their undersigned counsel, and respectfully submit the following court decisions compelling arbitration in support of the OPMs' "Motion to Enforce the Arbitration Provisions of the Master Settlement Agreement and Compel Arbitration." (Docket Nos. 262, 263.)

1. On June 22, 2007, the New Hampshire Supreme Court affirmed the trial court's decision compelling arbitration of this same dispute, holding that "the plain and unambiguous language of the MSA requires arbitration of this dispute." *New Hampshire v. Philip Morris USA, Inc.*, No. 2006-621, slip op. at 10 (N.H. June 22, 2007) (Exhibit 1). In so holding, the Supreme Court of New Hampshire found that the dispute regarding the NPM Adjustment, including the State's diligent enforcement defense to that Adjustment, must be arbitrated because "[t]he language used in section XI(c) is broad, encompassing '[a]ny dispute, controversy or claim arising out of or relating to' calculations performed by or any determinations made by, the Independent Auditor" and Section XI(c) "explicitly includes disputes related to the adjustments described in section IX(j), which lists various adjustments (including the NPM Adjustment)." *Id.*, slip op. at 6-7. Moreover, the Court held that under Section VII of the MSA, "it is abundantly clear that [the MSA courts do] not have jurisdiction to hear disputes over the applicability of the NPM Adjustment." *Id.*, slip op. at 7.

2. On July 10, 2007, the Kansas MSA court held that “[t]he language of the MSA is clear in its directive to submit disputes, such as this one, to arbitration.” *Kansas v. R.J. Reynolds Tobacco Co.*, No. 96-CV-919, slip op. at 10 (Kan. July 10, 2007) (stating that the MSA “clearly compels arbitration”) (Exhibit 2). The Court held that the Arbitration Clause’s requirement that “any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor,” applied here because the Auditor’s NPM Adjustment determinations “directly relate[] to whether [the] state has diligently enforced a qualifying statute.” *Id.*, slip op. at 8. Likewise, the Court found that Section VII of the MSA, which expressly excludes matters “provided in subsections IX(d) [and] XI(c),” made clear that the MSA courts “do[] not have jurisdiction to hear disputes over the applicability of the NPM Adjustment.” *Id.*, slip op. at 9-10. Finally, the court found that the structure of the MSA required nationwide arbitration because leaving this payment-related dispute to the MSA courts in 52 different jurisdictions would lead to “potential divergent outcomes resulting from 52 independent decisions.” *Id.*, slip op. at 9.

With these decisions, which are offered as supplemental authority, Courts in 44 of the 45 jurisdictions to consider the issue have held that arbitration of this dispute - including the issue of diligent enforcement - is required by the plain and unambiguous language of the MSA Arbitration Clause. Further, all ten appellate courts to consider the issue have held that this dispute must be arbitrated.

Respectfully submitted.

In San Juan, Puerto Rico this 18<sup>th</sup> day of July, 2007.

/s/ Salvador Antonetti-Zequeira

Fiddler, González & Rodríguez, PSC  
Salvador Antonetti-Zequeira (113910)  
P.O. Box 363507

San Juan, PR 00936-3507

E-mail: santonet@fgrlaw.com

Tel: 787-759-3207 / Fax: 787-250-7545

*Attorneys for Defendants Philip Morris USA  
Inc., R.J. Reynolds Tobacco Company and  
Lorillard Tobacco Company*

**OF COUNSEL:**

*Attorneys for RJ Reynolds Tobacco Co.*

Douglas G. Smith  
Salvatore F. Bianca  
Kirkland & Ellis LLP  
Aon Center  
200 East Randolph Drive  
Chicago, IL 60601  
Tel: 312-861-2000 / Fax: 312-861-2200

*Attorneys for Lorillard Tobacco Company*

Penny Reid  
Idit Froim  
Weil Gotshal & Manges  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212-310-8000 / Fax: 212-310-8007

*Attorneys for Philip Morris USA Inc.*

James D. Mathias  
Alexander Shaknes  
Brett Ingerman  
DLA Piper US LLP  
1251 Avenue of the Americas  
New York, NY 10020-1104  
Tel: 212-335-4500 / Fax: 212-335-4501

Thomas J. Frederick

Kevin J. Narko  
Winston & Strawn LLP  
35 West Wacker Drive  
Chicago, IL 60601  
Tel: 312-558-5600 / Fax: 312-558-5700

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice to the following: Benjamin Acosta, Jr., Francisco A. Besosa, Edgardo Cartagena Santiago, Jose A. Fuentes Agostini, William A. Graffam, Manuel A. Guzman Rodriguez, Paul H. Hulsey, Juan A. Ramos Diaz, Hector Reichard Jr., Vicente Santori Coll, Francisco M. Troncoso, Richard Schell Asad, Eric A. Tulla. Notice will be served by regular mail to the following non registered attorneys:

Attorney General for the Commonwealth of Puerto Rico  
Department of Justice,  
Roberto J. Sánchez Ramos, Esq.  
P.O. Box 9020192  
San Juan, PR 00902  
and

Scott C. Linden, Esq.  
Adam E. Miller, Esq.  
Michael B. Minton, Esq.  
William Newbold, Esq.  
Carl Rowley, Esq.  
Thompson & Coburn

Frederick C. Baker, Esq.  
J. Anderson Berly, Esq.  
Jerry Hudson Evans, Esq.  
W. Michael Gruenloh, Esq.  
Charles J. Mikhail, Esq.  
Ronald L. Motley, Esq.

One Mercantile Center  
St. Louis, MO 63101

Lee E. Young, Esq.  
Charles J. Mikhail, Esq.  
Ness, Motely, Loadholt, Richardson & Poole  
151 Meeting St. Suite 600  
PO Box 1137  
Charleston, SC 29402

Juan A. Ramos-Diaz, Esq.  
Ramos Diaz, Acevedo & Gonzalez CSP  
359 De Diego Ave., Suite 601  
San Juan, PR 00909-1740

Peter Bellacosa, Esq.  
Kirkland & Ellis  
153 E. 53rd Street  
New York, NY 10022

Michael S. Chernis, Esq.  
Alan Kaufman, Esq.  
Robert Gaffey, Esq.  
Kristi L. Midboe Miller, Esq.  
Jones, Day, Reavis and Pogue  
599 Lexington Ave.  
New York, NY 10022

Julie R. Fischer, Esq.  
Aaron H. Marks, Esq.  
Kasowitz, Benson, Torres & Friedman, LLP  
1301 Avenue of the Americas  
New York, NY 10019 6022

Robert F. McDermott, Jr., Esq.  
Jones, Day, Reavis & Pogue  
Metropolitan Square  
1450 G. Street, NW  
Washington, DC 20005

Ness, Motley, Loadholt, Richardson & Poole  
28 Bridgeside Blvd. Suite 400  
P.O. Box 1792  
Mount Pleasant, SC 29465

Jose A. Fuentes-Agostini, Esq.  
Akerman, Senterfitt & Eidson, PA - DC  
801 Pennsylvania Ave. NW Suite 600  
Washington, DC 20004

Paul H. Hulsey  
Hulsey Litigation Group, L.L.C.  
Charleston Harbor  
2 Wharfside 3  
Charleston, SC 29401

Vincent Chang, Esq.  
Davis Polk & Wardwell  
450 Lexington Avenue  
New York, NY 10017

Andrew T. Frankel, Esq.  
David M. Moss, Esq.  
Demetra Frawley, Esq.  
Kathleen L. Turland, Esq.  
Mark G. Cunha, Esq.  
Simpson, Thacher & Bartlett  
425 Lexington Ave.  
New York, NY 10017-3954

Marie V. Santacrocce, Esq.  
Kasowitz, Benson, Torres &  
Friedman, LLP  
1301 Avenue of the Americas  
New York, NY 10019 6022

Robert R. Merhige, Esq.  
Hunton & Williams  
Riverfront Plaza East Tower  
951 East Byrd St.  
Richmond, VA 23219 4074

In San Juan, Puerto Rico this 17<sup>th</sup> day of July, 2007.

ss/Salvador Antonetti-Zequeira  
Fiddler, González & Rodríguez, PSC  
Salvador Antonetti-Zequeira (113910)